Megapillars Sdn Bhd v Loke Kwok Four

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24-537-1995
KANG HWEE GEE J
12 MARCH 1996

Land Law *— Restraint on dealings — Caveats — Application to extend period of caveat — Failure to commence proceedings within currency of caveat — Action filed a month after filing application for extension of caveat — Caveator aware that their interest in land affected by delay of caveatee to remove caveats four years ago — Inordinate delay on part of caveator to prosecute his claim against caveatee — Whether amounted to inordinate delay — Whether court would grant extension — National Land Code 1965 s 326(2)*

Land Law *— Restraint on dealings — Caveats — Caveatable interest — Whether caveator a co-purchaser of land — Whether caveator a beneficiary under trust — Whether had caveatable interest — National Land Code 1965 s 323(1)(a) & (b)*

Land Law *— Restraint on dealings — Caveats — Caveatable interest — Conditional agreement — Conditions not fulfilled — Whether could give rise to caveatable interest in land*

The defendant was the registered proprietor of a piece of land ('the land') in Perak. On 20 June 1975, the defendant entered into a sales and purchase agreement ('the first agreement') to sell the land to Liew and Chan ('the purchasers') for the sum of RM181,900. The defendant paid a sum of RM18,290 to the purchasers upon execution of the first agreement, and it was agreed that the balance of RM163,610 would be paid after the defendant had caused the caveat on the land to be removed. Under the first agreement, it was provided that the purchasers could invite third parties to join them in the purchase of the land as joint purchasers. By a deed of assignment dated 12 May 1978, the purchasers assigned their rights and interests in the first agreement to MK Retnam Holdings Sdn Bhd ('MK Retnam'), which intended to develop a housing project on the land. MK Retnam paid the purchasers a sum of RM91,450 and it was agreed that the balance of RM91,000 should be paid by MK Retnam to the defendant when the caveat was removed. It appeared that the parties assumed the defendant would execute a valid and registrable memorandum of transfer to MK Retnam or its nominee when it received its balance purchase price. MK Retnam intended to appoint the plaintiff as the contractor of the housing project. To enable the plaintiff to apply for a bridging loan, MK Retnam entered into an agreement ('the second agreement') with the plaintiff, by which MK Retnam agreed to transfer the land to the plaintiff in consideration of the plaintiff paying RM91,000 to the defendant. It was stated in the second agreement that the plaintiff would hold the land on trust for MK Retnam. The plaintiff lodged a caveat on the land, and

subsequently applied for its extension under s 326(2) of the National Land Code 1965 ('the NLC'). The plaintiff alleged that it was entitled to do so under s 323(1)(a) of the NLC, as a co-purchaser with MK Retnam by virtue of its contribution of RM91,000 towards the purchase price. It was further submitted that the plaintiff could also derive his right to maintain the caveat under s 323(1)(b) by virtue of his position as a trustee for MK Retnam under the second agreement. The defendant's counsel submitted that the plaintiff did not have a registrable interest in the land, on the grounds, inter alia, that: (i) the second agreement with MK Retnam was only a conditional agreement which could not confer a caveatable interest; and (ii) the second agreement was only a joint venture agreement to develop a housing scheme, and thus the plaintiff's interest if any would be only in the profits to be derived from the scheme.

Held, dismissing the plaintiff's application:

(1) It was plain that the plaintiff was not a co-purchaser. Further, the party which would be beneficially entitled under the trust under s 323(1)(b) of the NLC would not be the plaintiff but MK Retnam. In any case, no such trust on the property could materialize until the proprietorship of the land was registered in the name of the plaintiff (see p 79F–G).

(2) The only claim to any interest that the plaintiff could lay claim to which merits consideration was the interest he claimed he had in the agreement he signed with MK Retnam (see p 79G).

(3) It is trite law that a caveator must have a caveatable interest in the land and not merely a pecuniary interest in it before he can lodge a caveat under s 323 of the NLC (see p 81B); *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 followed.

(4) Where the proposed caveatable interest is claimed through a contract for the sale of land, the contract must be enforceable by the caveator, and negotiations for a contract no matter how advanced are not capable of creating a caveatable interest in his favour (see p 81E); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 and *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 followed.

(5) The second agreement could only come into force after the caveat on the land had been removed, and after the defendant had executed a registrable memorandum of transfer in favour of MK Retnam or its nominee, the plaintiff. Until then, there was no agreement between the plaintiff and MK Retnam which would give the plaintiff the right to any legal or equitable interest in the land (see pp 81G–I and 82A–C); *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 followed.

(6) In construing whether the plaintiff had a caveatable interest, it would only be necessary to determine the plaintiff's immediate intention which was to acquire the land without having to look beyond their objective which was to enter into a joint development with MK Retnam. The court was therefore unable to agree that the plaintiff's interest in the agreement was not in the land but only in the joint venture agreement. The plaintiff had caveatable interest in the land (see pp 82I and 83A); *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247 followed.

(7) The plaintiff could have commenced proceedings against the defendant during the currency of their caveat before being served with the notice of removal by the registrar, given that they were aware that their interest in the land was affected by the delay of the defendant to remove the caveats as early as September 1990. As a matter of fact, they only filed an action against the defendant on 18 August 1995, a month after filing this application for extension of their caveat. Where there has been an inordinate delay on the part of the caveator to prosecute his claim against the caveatee, the court will not lend its assistance to allow him to maintain this caveat to the detriment of the registered proprietor. Thus, the court ought not to grant the plaintiff's application for extension (see pp 83D–I and 84C); *Plimmer Bros v St Maur* (1906) 26 NZLR 294 followed.

[Bahasa Malaysia summary

Defendan merupakan tuan punya berdaftar sebidang tanah ('tanah tersebut') di Perak. Pada 20 Jun 1975, defendan telah mengikat suatu perjanjian jual beli ('perjanjian pertama') untuk menjual tanah tersebut kepada Liew dan Chan ('pembeli') pada harga RM181,900. Defendan telah membayar jumlah sebanyak RM18,290 kepada pembeli atas penyempurnaan perjanjian pertama, dan ia dipersetujui bahawa baki sebanyak RM163,610 akan dibayar selepas defendan berjaya menyebabkan kaveat atas tanah tersebut dibatalkan. Di bawah perjanjian pertama, ia diperuntukkan bahawa pembeli boleh menjemput pihak ketiga untuk menyertai pembelian tanah tersebut sebagai pembeli bersama. Melalui suatu suratikatan penyerahhakan bertarikh 12 Mei 1978, pembeli telah menyerahhak hak dan kepentingan mereka dalam perjanjian pertama kepada MK Retnam Holdings Sdn Bhd ('MK Retnam'), yang merancang memajukan suatu projek perumahan atas tanah tersebut. MK Retnam telah membayar jumlah sebanyak RM91,450 kepada pembeli dan ia dipersetujui bahawa baki sebanyak RM91,000 harus dibayar oleh MK Retnam kepada defendan apabila kaveat dibatalkan. Nampaknya pihak-pihak telah menganggap defendan akan menyempurnakan suatu memorandum pindahmilik yang sah dan boleh daftar kepada MK

Retnam atau penerima namaannya apabila ia menerima baki harga beli. MK Retnam ingin melantik plaintif sebagai kontraktor projek perumahan. Bagi membolehkan plaintif memohon suatu pinjaman 'bridging', MK Retnam mengikat suatu perjanjian ('perjanjian kedua') dengan plaintif, dan MK Retnam telah bersetuju memindahmilik tanah tersebut kepada plaintif sebagai balasan bayaran plaintif sebanyak RM91,000 kepada defendan. Adalah dinyatakan dalam perjanjian kedua bahawa plaintif akan memegang tanah tersebut atas amanah untuk MK Retnam. Plaintif mengemukakan suatu kaveat atas tanah tersebut, dan kemudiannya memohon pelanjutannya di bawah s 326(2) Kanun Tanah Negara 1965 ('KTN'). Plaintif mengatakan bahawa ia berhak berbuat demikian di bawah s 323(1)(a) KTN, sebagai pembeli bersama MK Retnam melalui sumbangannya sebanyak RM91,000 terhadap harga belian. Ia selanjutnya dihujahkan bahawa plaintif juga boleh mendapat haknya untuk mengekalkan kaveat di bawah s 323(1)(b) menerusi kedudukannya sebagai pemegang amanah untuk MK Retnam di bawah perjanjian kedua. Peguam defendan berhujah bahawa plaintif tidak mempunyai sebarang kepentingan boleh daftar dalam tanah tersebut, atas alasan, antara lain, bahawa: (i) perjanjian kedua dengan MK Retnam hanyalah suatu perjanjian bersyarat yang tidak boleh mengurniakan kepentingan boleh kaveat; dan (ii) perjanjian kedua merupakan suatu perjanjian usahasama sahaja bagi memajukan suatu skim perumahan, dan justeru itu kepentingan plaintif kalau ada pun hanyalah dalam keuntungan yang akan diperolehi daripada skim itu.

Diputuskan, menolak permohonan plaintif:

(1) Adalah nyata bahawa plaintif bukan pembeli bersama. Lebih-lebih lagi, pihak yang akan berhak secara benefisial di bawah amanah di bawah s 323(1)(b) KTN bukanlah plaintif tetapi MK Retnam. Dalam apa keadaan pun, tiada amanah atas harta boleh menjadi kenyataan sehingga ketuanpunyaan tanah tersebut didaftarkan atas nama plaintif (lihat ms 79F–G).

(2) Tuntutan tunggal kepada mana-mana kepentingan yang boleh dibuat oleh plaintif yang wajar mendapat pertimbangan adalah kepentingan yang didakwa boleh didapati dalam perjanjian yang ditandatanganinya dengan MK Retnam (lihat ms 79G).

(3) Ia merupakan undang-undang mantap bahawa seseorang pengkaveat mesti mempunyai kepentingan boleh kaveat dalam tanah dan bukan kepentingan wang dalamnya sebelum dia boleh mengemukakan kaveat di bawah s 323 KTN (lihat ms 81B); *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 diikut.

(4) Di mana kepentingan boleh kaveat yang dicadangkan dituntut menerusi suatu kontrak untuk jualan tanah, kontrak itu mesti boleh dikuatkuasakan oleh pengkaveat, dan perundingan untuk

kontrak tidak kira bagaimana lanjut pun tidak dapat mewujudkan kepentingan boleh kaveat yang memihak kepadanya (lihat ms 81E); *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 dan *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 diikut.

(5) Perjanjian kedua hanya boleh berkuatkuasa selepas pembatalan kaveat atas tanah tersebut, dan selepas defendan melaksanakan memorandum pindahmilik boleh daftar yang memihak kepada MK Retnam atau penerima namaannya, iaitu plaintif. Sehingga masa itu, tiada terdapat perjanjian di antara plaintiff dan MK Retnam yang boleh memberi plaintif hak kepada mana-mana kepentingan undang-undang atau ekuiti dalam tanah tersebut (lihat ms 81G–I dan 82B–C); *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 diikut.

(6) Dalam membuat tafsiran sama ada plaintif mempunyai kepentingan boleh kaveat, ia hanya perlu untuk menentukan tujuan utama plaintif iaitu memperolehi tanah tanpa keperluan untuk melihat lebih jauh daripada objektif mereka yakni mengikat suatu perjanjian pemajuan dengan MK Retnam. Oleh yang demikian, mahkamah tidak dapat bersetuju bahawa kepentingan plaintif dalam perjanjian itu bukanlah dalam tanah tersebut tetapi hanya dalam perjanjian usahasama. Plaintif mempunyai kepentingan boleh kaveat dalam tanah tersebut (lihat ms 82I dan 83A); *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247 diikut.

(7) Plaintif boleh memulakan prosiding terhadap defendan semasa tempoh kaveat mereka sebelum disampaikan dengan notis pembatalan oleh pendaftar, memandangkan bahawa mereka sedar kepentingan mereka dalam tanah tersebut terjejas oleh kelewatan defendan dalam membatalkan kaveat-kaveat sejak awal bulan September 1990. Malahan mereka hanya memfailkan suatu tindakan terhadap defendan pada 18 Ogos 1995, sebulan selepas memfailkan permohonan ini untuk pelanjutan kaveat mereka. Di mana terdapat kelewatan terlampau pada pihak pengkaveat dalam mendakwa tuntutannya terhadap penanggung kaveat, mahkamah tidak akan menghulurkan bantuan supaya membenarkannya mengekalkan kaveat ini sehingga menjejaskan tuan punya berdaftar. Maka, mahkamah tidak patut membenarkan permohonan plaintif untuk perlanjutan (lihat ms 83D–I dan 84C); *Plimmer Bros v St Maur* (1906) 26 NZLR 294 diikut.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2428.

Cases referred to

Abdul Rahim v Vallapai Shaik [1987] 2 MLJ 700

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754
Hew Sook Ying v Hiw Tin Hee [1992] 2 SCR 257
Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782
Plimmer Bros v St Maur (1906) 26 NZLR 294
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44
Teo Ai Choo v Leong Sze Hian [1982] 2 MLJ 12
Trans-Summit Sdn Bhd v Chun Nyook Lin [1995] 3 MLJ 247
Trans Trust SPRL v Danubian Trading Co Ltd (1952) 2 QB 297
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113

Legislation referred to

National Land Code 1965 ss 323(1)(a), (b), 325, 326(2), 327, 328(1)

LA Gomes (*LA Gomes & Co*) for the plaintiff.
NT Rajah (*Maxwell Kenion Cowdy & Jones*) for the defendant.

Kang Hwee Gee J: By this summons, the plaintiff is applying for an extension of a private caveat lodged by them on land held under CT 13845 Lot 16151, Mukim Ulu Kinta, Perak under s 326(2) of the National Land Code 1965 ('the NLC').

The application is supported by the affidavits of Chang Ah Meng (encl 2 and encl 9), the managing director of the plaintiff's company.

The plaintiffs claim that they have a registrable interest in the said land which was derived from an agreement (CAM–5 in encl 2) they entered with a company called MK Retnam Holdings Sdn Bhd. They had on 18 April 1995 filed an action in the High Court to claim their interest from the defendant.

The interest was not acquired directly but in the following manner:

1 On 20 June 1975, the defendant Loke Kwok Four ('the registered proprietor of the said land') entered into a sales and purchase agreement ('CAM–2') with Liew Ah Chai and Chan Koi Chan, wherein the defendant agreed to sell the said land to the latter for the sum of RM181,900. At the time of the agreement, there was in existence a caveat on the land which was lodged by one Loke Kwok Seng which the contracting parties duly acknowledged in the said agreement. A sum of RM18,290 was paid to the defendant by the purchasers upon execution of the agreement. The balance of the purchase price of RM163,610 was to be paid by the purchasers only after the defendant had caused the caveat on the land to be removed.

Under clause 3 of the agreement it was provided that:

3 The Purchasers may if they so desire invite third parties to join them in the purchase of the said land as joint purchasers with the Purchasers herein and the Vendor shall not interfere prevent or stop the Purchasers

A from so doing and the Vendor shall transfer the said land to the Purchasers and any additional purchasers their nominee or nominees upon receipt of the balance of the purchase price for the said land Provided that in the event that any third parties shall have been taken in by the Purchasers as additional joint purchasers notice of this shall be given within (30) days of such joining by the Purchasers herein to
B the Vendor.

2 By a deed of assignment dated 12 May 1978, the purchasers Liew Ah Chai and Chan Koi Chan assigned their rights and interests in the sales and purchase agreement to MK Retnam Holdings Sdn Bhd for a consideration of RM1. Under the deed of assignment, MK Retnam
C agreed to pay the balance of the purchase price of RM163,610 due to the defendant Loke Kwok Four under the sales and purchase agreement of 20 June 1975. They also agreed to pay the purchasers a further sum of RM20,000 at the time they pay the defendant the sum of RM163,610 (which presumably would not be due before the removal of the caveat lodged by Loke Kwok Seng).

D 3 Upon acquiring the interest from Liew Ah Chai and Chan Koi Chan, MK Retnam (and probably upon a renegotiation) had paid the former a sum of RM91,450 being ½ the purchase price of the land as evidenced by the execution of the transfer Form 14A (exh CAM–4) for ½ share of the said land, leaving a balance of another RM91,000
E for the other ½ share.

4 On 19 September 1990, the plaintiff entered into an agreement with MK Retnam Holdings Sdn Bhd. Under this agreement, MK Retnam agreed to transfer the said land to the plaintiff in consideration of the plaintiff paying the remainder of the purchase price of RM91,000 to
F the defendant.

To comprehend the nature of this agreement it is necessary to reproduce the recital in full as follows:

Recital

G 1 By an Agreement dated the 20 June 1975 entered into between Loke Kwok Four of the one part and Messrs Liew Ah Chye @ Liew Leong Hin and Chan Kooi Chan of the other part the latter purchased a piece of land held under CT No 13845 for Lot No 16151 in the Mukim of Ulu Kinta measuring 22a 3r 18p (hereinafter called the 'Said Land') for the sum of RM181,900 (hereinafter called the 'Principal Agreement').

H 2 The First Party has by a Deed of Assignment dated 12 May 1978 and entered into between Messrs Liew Ah Chye @ Liew Leong Hin and Chan Kooi Chan of the one part and Messrs MK Retnam Holdings Sdn Bhd of the other part wherein Liew Ah Chye @ Liew Leong Hin and Chan Kooi Chan assigned the rights, benefits and obligations of the Principal Agreement unto MK Retnam Holdings Sdn Bhd.

I 3 The First Party has to-date paid a total sum of RM91,450 and there still remains another sum of RM91,000.

4 The Said Land has been encumbered with caveats lodged by Chew Hoe Tuck and Loke Kwok Seong. Other caveats lodged on the Said

Land by Ong Siew Teik, MK Retnam Holdings Sdn Bhd and by Ong Siew Teik Holdings Sdn Bhd have already expired.

5 The parties have the knowledge that on paying the balance sum of RM91,000 to the registered owner through his Solicitors, Maxwell, Kenion, Cowdy & Jones the registered owner shall execute a valid and registrable memorandum of transfer to the First Party or his nominee of nominees.

6 The First Party shall see to it that the registered owner Loke Kwok Four or his Solicitors be responsible to remove the caveats or any other encumbrances.

7 As security for the Second Party and in consideration of the Second Party contributing the RM91,000 the First Party has agreed to have the Said Land transferred in favour of the Second Party. In such an event the Second Party hereby declares and acknowledges that he holds the Said Land on trust for the First Party.

8 The First Party hereby agrees to have the Said Land transferred to the Second Party as a matter of expediency so that the Second Party shall be able to apply to a financial institution for bridging finance.

9 The First Party is desirous of developing the Said Land into a housing in accordance with the plans as may be approved by the Appropriate Authority (hereinafter called 'The Said Housing Scheme').

10 The First Party is desirous of employing the Second Party and the Second Party has agreed to develop the Said Land into a housing scheme subject howsoever upon the terms and conditions hereinafter appearing.

What exactly is the plaintiff's interest in the agreement with MK Retnam?

It is clear to me under the agreement that,

1 The parties had assumed that on payment of this sum to the defendant, the defendant would execute a valid and registrable memorandum of transfer to MK Retnam or its nominee after all the caveats were removed. To-date the plaintiff had yet to pay the sum of the defendant and from the letter (exh CAM–1 in the plaintiff managing director's affidavit encl 2) the plaintiff was ready and willing and able to pay this sum provided the defendant was able to transfer the property to the plaintiff.

2 The said transfer was not intended to vest actual ownership on the plaintiff as under recital 7, the plaintiff declared that they would only be holding the land on trust for MK Retnam and, under recital 8 that the purpose of the transfer was only for the expedience of allowing the plaintiff to use the land to obtain financing from financial institutions for the purpose of developing the said land into a housing scheme.

3 MK Retnam had intended to develop the land into a housing scheme and would employ the plaintiff as the contractor for MK Retnam in the housing project in accordance with the terms and conditions which follows in the said agreement (recitals 9 and 10).

Under s 323(1) of the NLC, a private caveat may be entered by:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

According to counsel for the plaintiff, by the agreement they entered into with MK Retnam, the plaintiff had become a co-purchaser of the defendant's land. This was so because under cl 3 of the original agreement (CAM–2) the purchasers could invite third parties to join them in the purchase of the said land and this right accrued to MK by the assignment (CAM–3). By their contribution of the purchase price of RM91,000 to MK, the plaintiff would become co-purchaser. The right of the plaintiff to lodge the caveat and thereafter to its extension, counsel contended, was founded on his interest as a co-purchaser with MK Retnam under s 323(1)(a) of the NLC. Further, counsel submitted, the plaintiff could also derive his right to maintain the caveat under s 323(1)(b) by virtue of his position as a trustee for MK Retnam under the declaration of trust made by the latter under recital 7 of the agreement.

It is plain that the plaintiff could never be a co-purchaser as it is clear from the agreement that he was supposed to hold the land on trust for MK Retnam, and the consideration of RM91,000 he was supposed to pay to the defendant was merely to enable him to participate in the joint venture. Neither could he be a person beneficially entitled under recital 7 as the person who would be beneficially entitled under the trust under s 323(1)(b) would not be the plaintiff but MK Retnam. In any case, no such trust on the property could materialize until the proprietorship of the land is eventually registered in the name of the plaintiff. The only claim to any interest that the plaintiff could lay claim to which merits consideration, in my view, is the interest he claimed he had in the agreement he signed with MK Retnam.

The defendant put forth a number of reasons in his affidavits why be believed that the plaintiff did not have a caveatable interest in his land following which the plaintiff's managing director Chang Ah Meng deemed it necessary to reply to by further affidavit in (encl 9). At the hearings before me, however, defendant's counsel confined his submissions to three grounds to support his argument that the plaintiff did not have such interest in the defendant's land to entitle him to continue to maintain the caveat. For the sake

of brevity, I will confine my considerations only on the three grounds raised by his counsel which in my judgment will dispose of this application: A

(i) there was no privity of contract between the plaintiff and the defendant. Without a contract with the defendant he submitted, the plaintiff could not have a registrable interest in the defendant's land;

(ii) the agreement with MK Retnam was only a conditional agreement which could not confer a caveatable interest on the defendant's land; and B

(iii) at best, the said agreement was only a joint venture agreement to develop a housing scheme. The plaintiff's interest if any would be only in the profits to be derived from the scheme and not interest in the land. C

I need not deliberate at length on the first ground (which clearly is bereft of merit) save to say that privity of contract with the registered owner has never been criterion for determining whether a person is entitled to maintain a caveat. The second and third grounds however are substantial and merit consideration. D

Before I consider the merit of the plaintiff's application, it is first necessary for me to state in brief the accepted tests that are laid down in the various authorities and invariably applied in all applications to remove or to extend caveats which I am bound to follow. E

The test to be applied

The Court of Appeal in *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 has now formulated three stages that must be transcended in application to remove a caveat (which should also apply to an application for extension as in the present case) in the following passage: F

> First, whether the respondent, on the material set out by him in his application under s 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then whether the balance of convenience, or more appropriately the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit (per Gopal Sri Ram, JCA). G H

Has the plaintiff disclosed a caveatable interest?

In support of his submission that the agreement between the plaintiff and MK Retnam was only a conditional agreement counsel relied on cl 19 which read as follows: I

> The provisions of this Agreement shall only take effect when the existing caveats have been successfully removed and the registered owner Loke Kwok Four has executed a valid and registrable memorandum of transfer in favour of the First Party or his nominee, the Second Party.

It is trite law that a caveator must have a caveatable interest in the land and not merely a pecuniary interest in it before he can lodge a caveat under s 323 of the NLC [*Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44]. Thus, in *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113, a contractual right to an unpaid balance of the purchase price of the sale of land was held by the Federal Court to be incapable of creating a caveatable interest in land which would entitle the caveator to continue to maintain his caveat. Likewise, in the Supreme Court case of *Abdul Rahim v Vallapai Shaik* [1987] 2 MLJ 700 (a case cited by defendant's counsel), an agreement entered into by the three beneficiaries of the estate of the deceased to sell land which was conditional upon consent being given by the four other beneficiaries and upon the purchaser making the monthly instalments towards the discharge of charge of that land to the bank, was held to confer no caveatable interest on the purchaser.

Further, where that interest is claimed through a contract for the sale of land, the contract must be enforceable by the caveator and negotiations for a contract no matter how advanced is not capable of creating a caveatable interest in his favour [*Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754]. The point is well illustrated by the following passage in the Court of Appeal case of *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782 at pp 789–790:

> Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has no interest that is capable of protection by the entry of a caveat ... (per Gopal Sri Ram JCA).

To return now to the present application. An objective appraisal of cl 19 can only yield to the interpretation that the agreement with MK Retnam could only come into force after the caveats on the land had been removed and after Loke Kwok Four had executed a registrable memorandum of transfer in favour of MK Retnam or its nominee, the plaintiff. What then is the legal position of such a contract?

In *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at p 304, a contract for the sale of goods was made subject to a condition that the buyer was to open a confirmed letter of credit in favour of the seller. Denning LJ interpreted such contract in the following words:

> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formulation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases, a contract is concluded and a stipulation for a

> credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of the contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

Applying Denning's interpretation to the present agreement, I am inclined to hold that unless and until the events mentioned in cl 19 take place, there is no agreement between the plaintiff and MK Retnam which would give the plaintiff the right to any legal or equitable interest in the land. At the time when the plaintiff filed this application, there was still in existence not only the caveat filed by Loke Kwok Seng, the defendant's brother, but also other caveats filed by some other parties which under the circumstances would prevent the defendant from executing a registrable memorandum of transfer in favour of MK Retnam or its nominee, the plaintiff. This is clear from the affidavit of Fong Fatt Khuan, the defendant's mother (encl 4) which was not disputed.

I would therefore agree with counsel for the defendant that until the events take place, the plaintiffs have no caveatable interest in the defendant's land.

In respect of the third ground that the plaintiff's interest was not in the land, however, I have a different view. In support of his contention that the plaintiff's interest was not in the land but merely in the joint venture agreement defendant's counsel relied on recitals 9 and 10 of the agreement. A joint venture agreement, he submitted, does not create a caveatable interest in land. As authority he cited a passage in the Court of Appeal case of *Trans-Summit Sdn Bhd v Chun Nyook Lin* [1995] 3 MLJ 247 at p 251:

> In the proceedings before us, what interest does the respondent possess? It is not in the land. That has already been validly sold. Her interest really lies in the profits that her company hopes to gain from the joint venture agreement with the appellant, which is being challenged by the appellant. The civil suit testifies to this. As her interest is only monetary in nature, she has therefore no caveatable interest over the land. She cannot continue to have the private caveat lodged by her extended until after the disposal of the civil suit (per Siti Norma Yaakob, JCA).

I have no reason to disagree with defendant counsel that the plaintiff's interest in the agreement is primarily to develop the land into a housing scheme. This is clear from recitals and the other clauses in the agreement which clearly indicate the intention of the parties. But it is also clear that if the plaintiff did not acquire a registrable interest in the land, they would not be able to enter into a joint venture to develop the land into a housing scheme. It would not therefore stand to reason to conclude that the plaintiff had no interest in the land. In construing whether the plaintiff had a caveatable interest, it would only be necessary to determine the plaintiff's immediate intention which was to acquire the land without having to look beyond their objective which was to enter into a joint development with MK Retnam.

A I am therefore unable to agree with defendant counsel's contention that the plaintiff's interest in the agreement was not in the land but only in the joint venture agreement. Assuming that the agreement is not unenforceable as I have so held, I would have to find that the plaintiff had caveatable interest in the said land.

B

Timeous commencement of action

There is another aspect of the plaintiff's application which I ought to consider which should more conveniently be considered under the balance of convenience test. It could however, stand as a separate ground on its C own — contumelious delay to prosecute their claim against the defendant.

Under s 328(1) of the NLC, a private caveat is effective for six years unless sooner withdrawn under s 325 or removed by the registrar under s 326, or by the court under s 327. The plaintiff did not disclose precisely when caveat 446/91 was entered by them. But from the prefix '91' it must D have been lodged in 1991, some four years before he filed proceedings against the defendant on 18 August 1995 as disclosed in para 22. However, in his further affidavit (encl 9), the managing director of the plaintiff company, Chang Ah Meng, deposed under para 11 that:

> 11 We are unaware what other rights other caveatees may have, but the E respondent has taken action to remove the other caveats and should be able to do so. The respondent has been delaying this matter since the 5 September 1990 when they were given an undertaking by the solicitors for Messrs MK Retnam Holdings Sdn Bhd for the payment of the sum of RM91,000 (Ringgit Malaysia Ninety One Thousand Only). The respondent's solicitors never replied these letters.

F It is clear to me that the plaintiff could had they so wished commenced proceedings against the defendant during the currency of their caveat before being served with the notice of removal by the registrar, given that they were aware that their interest in the land was affected by the delay of the defendant to remove the caveats as early as September 1990 as disclosed G in para 11 of the affidavit. The plaintiff did not act and remained inactive for some four years and chose to act only after being served with the notification of removal from the registrar in Form 19C on 27 July 1995. As a matter of fact they only filed an action against the defendant on 18 August 1995, a month after filing this application for extension of their H caveat.

The object of a caveat like that of an interlocutory injunction is to provide interim protection to the interest of the applicant who can show that he has a genuine claim on that interest, and that the status quo between the parties should be maintained pending the final disposal of his I claim at a later date. It follows therefore, that the applicant must pursue his claim timeously in the court and failure to do so will defeat the privilege of having his caveat being applied against the inalienable right of the registered proprietor to enjoy his land. Thus, where there has been an

inordinate delay on the part of the caveator to prosecute his claim against the caveatee, the court will not lend its assistance to allow him to maintain this caveat to the detriment of the registered proprietor 'as to prevent a man dealing with his property after such a long delay is so in inequitable.' [per Stout, CJ in the New Zealand case of *Plimmer Bros v St Maur* (1906) 26 NZLR 294 cited and approved in the Singapore High Court in *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12, and see also *Hew Sook Ying v Hiw Tin Hee* (1992) 2 SCR 257].

I am of the view that in the present case, the plaintiff's failure to act within the currency of the caveat that they had themselves lodged is crucial, and in my judgment, for the same reason as adumbrated in *Plimmer Bros*, I ought not to grant the plaintiff's application for extension.

The plaintiff's application is dismissed with costs.

Order accordingly.

Reported by Isabel Liong